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No. 91-1594

In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Since A State May Prohibit Cold Call Solicitation By Its Attorneys, It May Similarly Regulate Its CPAs 1

II. Florida's Ban On Direct, In-Person Solicitation By CPAs Furthers A Substantial State Interest, Is Narrowly Tailored To Meet The Desired Objective, And Does Not Violate The First Amendment 8

III. The Board's Rule Bolsters CPAs Independence As They Perform The Attest Function. 12

IV. The Rule Does Not Violate The Equal Protection Clause, Nor Does It Prevent Competition 15

V. Florida's Rule Is A Reasonable Time, Place And Manner Restriction 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Accountant's Society of Virginia v. Bowman,
860 F.2d 602 (4th Cir. 1988) 4, 16

Arthur Young & Co. v. Reves,
937 F.2d 1310 (8th Cir. 1991),
cert. granted, __ U.S. __,
112 S.Ct. 1159 (1992) 14

Barnes v. Glen Theatre, Inc.,
___ U.S. ___, 111 S.Ct. 2456 (1991) 6

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) . . . . . passim

Board of Trustees of the State
University of New York v. Fox,
492 U.S. 469 (1989) 11

Boos v. Barry,
485 U.S. 312 (1988) 18

Central Hudson Gas & Electric Corp. v.
Public Service Commission of New York,
447 U.S. 557 (1980) . . . . . passim

Fane v. Edenfield,
945 F.2d 1514 (11th Cir. 1992) 4, 7, 15

Garden v. Frier,
__ So.2d __, 17 F.L.W. S381 (1992) 3

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 10

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 3

Page(s)

Greenberg v. Michigan Optometric Ass'n., Inc.,
483 F. Supp. 142 (E.D. Mich. 1980) 11

In re Primus,
436 U.S. 412 (1978) 16

In re R.M.J.,
455 U.S. 191 (1982) 8, 9

Kovacs v. Cooper,
336 U.S. 77 (1949) 10

Linmark Associates, Inc. v.
Township of Willingboro,
431 U.S. 85 (1977) 19

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) 10

Ohio State Bar Association v. Ohralik,
357 N.E.2d 1097 (1976) 5

Ohralik v. Ohio State Bar Association,
436 U.S. 447 (1978) . . . . . passim

Peel v. Attorney Registration and
Disciplinary Commission of Illinois,
496 U.S. 91, 110 S.Ct. 2281 (1990) 3

Pierce v. AALL Insurance Inc.,
531 So.2d 84 (Fla. 1988) 3

Planned Parenthood of Southeastern
Pennsylvania v. Casey,
___ U.S. ___, 112 S. Ct. 2791 (1992) 16

R.A.V. v. City of St. Paul, Minnesota,
___ U.S. ___, 112 S.Ct. 2538 (1992) 17

Page(s)

Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1986) 19

Shapero v. Kentucky Bar Association,
486 U.S. 466 (1988) . . . . . passim

State Department of Professional Regulation Board of Accountancy v. Rampell,
589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, No. 79,371 (Supreme Court of Florida, February 17, 1992) 5

U.S. v. DeFusco,
930 F.2d 413 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 239 (1991) 8

United States v. Arthur Young & Co.,
465 U.S. 805 (1984) 8

Vidal Sassoon, Inc. v. Bristol Myers Company,
661 F.2d 272 (2d Cir. 1981) 8

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748 (1976) 10, 17, 18

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 18

Williamson v. Lee Optical of Oklahoma, Inc.,
348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) 16

Zauderer v. Office of Disciplinary Counsel of Supreme Court,
471 U.S. 626 (1985) . . . . . passim

Page(s)

FLORIDA ADMINISTRATIVE CODE

§ 21A-24.002(2), F.A.C. 1

§ 21A-24.002(3), F.A.C. 1

§ 21A-24-001, F.A.C. 11

FLORIDA STATUTES

§ 498.023, Fla. Stat. (1991) 12

§ 501.025, Fla. Stat. (1991) 12

§ 934.03, Fla. Stat. (1991) 12

OTHER AUTHORITIES

American Bar Association Model Rule 7.3 2

Berryman, "*Auditor Independence: Its Historical Development and Some Proposals for Research*," in *Ethics in the Accounting Profession*, 141 (1978) . 13

Goelzer, *The SEC and Opinion Shopping: a Case Study in the Changing Regulation of the Accounting Profession*,
52 Brook. L. Rev. 1057 (1987) 14

Matters Relating to Independent Accountants,
6 Fed. Sec. L. Rep. (CCH) ¶ 73,251 (1992) 13

Model Code of Professional Responsibility, DR 2-102 2

Ohio Code of Professional Responsibility, DR 2-103 2

Page(s)

Rule 4-7.4(a) of Florida Rules of Professional Conduct, Rules Regulating the Florida Bar 1

Sternberg, *Cooked Books: Practices of Large Accounting Firms Contributed to Financial Scandals*, Vol. 269, No. 1, The Atlantic, 20 (January, 1992) . 13

The Accounting Establishment, A Staff Study of the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations, S. Doc. No. 95-34 at 52, 95th Cong., 1st Sess. (March 31, 1977) 15

The Big Eight, Management Consulting and Independence: Myth or Reality, 61 Cal. L. Rev. 1511 (1988) 13

ARGUMENT

I. Since A State May Prohibit Cold Call Solicitation By Its Attorneys, It May Similarly Regulate Its CPAs.

Florida bans any "cold call" solicitation[1] of prospective clients by both accountants and attorneys.[2] This Court's *Ohralik*[3] decision stands for the proposition that a State professional licensing agency may prohibit attorney cold call solicitation of prospective clients for *any* purpose, and Respondent Fane ("Fane") does not argue to the contrary.[4]

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[1] As in its initial brief, Petitioners, the members of the Florida Board of Public Accountancy (the "Board"), use the term "cold call solicitation" to refer to any uninvited direct, personal communication, whether face-to-face or over a telephone.

[2] Section 21A-24.002(2) provides "[a] licensee shall not by any direct in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . [c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication." Section 21A-24.002(3) makes unlawful "any communication which directly or implicitly requests an immediate oral response from the recipient." Collectively, these provisions are described herein as "the Rule". Rule 4-7.4(a) of the Florida Rules of Professional Conduct, Rules Regulating the Florida Bar, similarly prohibits cold call solicitation by Florida attorneys.

[3] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[4] Nor could he. As this Court said in *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 475 (1988):

> Our decision in *Ohralik* that a state could categorically ban *all* in-person solicitation turned on two factors (emphasis added).

See also, Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626 (1985); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990). Ohio's rule as to attorneys in *Ohralik* banned *all* cold call attorney solicitation (then DR 2-102(A) and DR 2-104(A), quoted

(continued...)

Fane nonetheless relies, together with the majority of the Court of Appeals below, on the "unique facts" regarding Ohralik's solicitation[4] to limit the impact here of *Ohralik*. Fane's position misreads *Ohralik* which, today, stands for the permissibility of a total ban on *all* cold call attorney solicitation, whether the solicitation offers tax representation (where the attorney and CPA may perform identical functions), business representation (where the client may be as sophisticated as the attorney or CPA, and may be identical as between the attorney and CPA),[5] or a particular "personal" representation where "special facts" such as overreaching of an emotionally distraught victim might be a factor.[7]

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[4](...continued)
in *Ohralik*, 436 U.S. at 453, at fn. 9) and, in this regard, has not changed. *See* Ohio Code of Professional Responsibility, DR 2-103. In fact virtually all states derive their disciplinary rules from the American Bar Association's Model Rules of Professional Conduct or its precursor Model Code of Professional Responsibility, both of which bar virtually all cold call attorney solicitation. *See* American Bar Association Model Rule 7.3 and DR 2-102 of the Model Code.

[5] The "unique facts" involved in *Ohralik* were the nature of cold call solicitation itself, not the condition, age, or sex of the persons Ohralik actually solicited. This is made clear in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985); *see also, Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 481 (1988) (O'Connor, J., dissenting).

[6] As noted above, the ABA Model Rules and virtually all related state codes of professional responsibility for attorneys prohibit *all* cold call solicitation for profit, of whatever client for whatever purpose. At least as to these two categories of clients (tax and business), the conclusion of the District Court below that the "two groups of potential clients that are targeted for solicitation [by CPAs and attorneys] are in significantly different positions" (J.A. at 84) is simply wrong.

[7] The fact that not all states have determined to prohibit direct, in-person uninvited solicitation by CPAs does not invalidate the judgments of the states that do have such prohibitions. The states should be entitled to "broad latitude" and deference in exercising their power to regulate the learned professions and to protect the public and the profession from abuses. *See* (continued...)

This Court, in stating its support for a prophylactic ban in *Ohralik*, acknowledged state licensing agencies have the right to proscribe this type of solicitation in the name of the professional standards the State has required them to impose, regardless of whether the solicitation could, in fact, be shown to be false, fraudulent, or otherwise subject to censure. *Ohralik*, 436 U.S. at 464; *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

The issue before this Court is whether there is something sufficiently peculiar about attorneys that allows a State to bar cold call solicitation of prospective clients by attorneys, but prohibits the State from imposing a similar limitation on its CPAs or other learned professionals.[8] The Board submits that Fane's attempt to distinguish CPAs from attorneys is an irrelevant distinction with no logical difference. Once any consideration of "special or unique facts" is eliminated (as this Court did in *Ohralik*), there is no difference in the State's right to set the same anti-solicitation rule for all learned professionals subject to its regulation.[9] This is not

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[7](...continued)
Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 2297-2298 (1990) (O'Connor, J., dissenting).

[8] Recently the Florida Supreme Court in *Garden v. Frier*, __ So.2d __, 17 FLW S381 (1992) was asked to determine whether a land surveyor was a professional so as to avail himself of a shorter statute of limitations for "professional" malpractice. The Court determined that, for that purpose only, a "profession" in Florida required as a minimum, (i) licensing, (ii) specialized knowledge and (iii) academic preparation amounting to at least a four-year university level degree in the field of study specifically related to that calling. *See also, Pierce v. AALL Insurance Inc.*, 531 So.2d 84 (Fla. 1988).

[9] This Court in upholding the Board's ban on cold call solicitation by CPAs need not determine the comparability of learned professionals other than CPAs to attorneys (or CPAs). The Board is concerned only with the comparability of CPAs to attorneys. The dissent below suggested that attorneys and CPAs are "more alike than they are different," noting that the rationale for *Ohralik* is really based on "the gap in knowledge between the professional and the lay person;" that "[t]o think that clients may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable;" that while clients of CPAs (continued...)

to suggest that such rules should apply to non-members of learned professions, such as those involved in direct marketing of "generally available products and services."[10/]

Fane's insistence that there be current empirical evidence showing a necessity for the Rule not only ignores this Court's holdings in *Ohralik*, *Shapero*, and *Zauderer*, but creates a nearly impossible burden for the Board.[11/] As the AICPA Report[12/] shows, the AICPA in 1981 had no empirical evidence that cold call solicitation had been overreaching or abusive, or that it had resulted in false, fraudulent, or deceptive actions by CPAs of their clientele. Nor is there any indication the Florida legislature or the Board had before it such evidence in adopting the challenged ban on such solicitation.

The Rule was adopted for its prophylactic purpose, not because of any empirical evidence necessitating it.[13/] Furthermore, as the Rule has been in effect since 1979 and is based upon earlier prohibitions contained in the AICPA Code of Ethics, compliance with the prohibition[14/] would have prevented the accumulation of evidence as to the impact of non-compliance. The Florida Fourth District Court of Appeal, in upholding the enforceability of the Rule, also recognized the inherent impracticality of demanding "empirical evidence" of abuse. *State Department of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d at 1357.

The Rule bars *all* cold call solicitation by CPAs, although, as the Dooner affidavit[15/] reflects, its rationale was focused on the CPA "attest" function. It is that function that initially set CPAs apart from others performing accounting services. Today's

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[9/](...continued)
may not be "under the kind of emotional distress that a potential personal injury client would be under," a CPA client "has a great deal to lose;" that there is "an incentive for fraudulent CPAs;" and there is a "heavy reliance that the public places in the accuracy of financial statements," (comparable to the attorney's public posture as an officer of the court). ***Fane v. Edenfield***, 945 F.2d 1514, 1520-23 (11th Cir. 1991).

[10/] The *amici curiae* brief filed by the American Advertising Federation, Association of National Advertisers, Inc., Direct Marketing Association, Inc. and Olan Mills, Inc. in support of Fane perceives the Board's position to be one of seeking a generalized ban on all telephone solicitation. This is *not* the Board's position. In fact, the Board endorses this statement of the advertising industry:

> [t]he interests of the states in regulating the practice of professions within their borders is plainly different from -- and more substantial than -- its interest in restricting protected communications of advertisers and marketers of generally available products and services.

Amici Curiae Br. at 9, fn. 8. The Board has proffered that Florida's ban on cold call solicitation is consistent with *Ohralik* and the First Amendment, by reason of the fact that CPAs are members of a regulated "learned profession", as well as the specific similarities detailed in the dissent below (*see* fn. 9, *supra*). The Board makes no contention that a similar ban on direct marketing of "generally available products and services " would likewise be consistent with the First Amendment. That is not the issue before this Court.

[11/] *See also, Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605-606 (4th Cir. 1988) (Board of Accountancy was not required to make an evidentiary showing at trial in order to establish the misleading nature of the use of the term "public accountant" by unlicensed accountants).

[12/] American Institute of Certified Public Accountants, Report of the Special Committee on Solicitation (Sept. 1981) (J.A. 29-77, at 38-39).

[13/] It may be equally noted that nothing in *Ohio State Bar Association v. Ohralik*, 357 N.E.2d 1097 (1976), or the briefs in that case to this Court, indicates that the Ohio Bar Association had any such empirical evidence before it in adopting or enforcing its comparable prophylactic rule.

[14/] As Fane points out (Brief at 7), the order of the District Court below (voiding the Rule) has now been in effect for two years. As Fane does not point out, the ban on cold call solicitation imposed by the Rule has been upheld in *State Department of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, No. 79,371 (Supreme Court of Florida, February 17, 1992) (oral argument set for May 1993).

[15/] Affidavit of Louis W. Dooner, filed by the Board below (J.A. 16-23).

accountants do many other things, and, specifically, as both the Board's initial brief and Fane's brief acknowledge, offer tax advice and management services. The Rule has valid purpose in its prophylactic sweep impacting all CPA services, which purposes are enumerated in the Board's initial brief (at 22-25). And while Fane charges the Board with changing its reliance on the "purpose" of the Rule, this Court has opined that its "appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature . . . ." *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 2469 (1991) (Souter, J. concurring).

Fane's challenge, based on an assertion he does not desire to exercise (at least, *generally*) the "attest" function (J.A. 25) rings hollow, since the services he says he chooses to perform, he may perform by simply electing *not* to be a CPA.[16/] In fact, Fane's posture is contradictory. He says that *generally* he does not desire to perform the "attest" function, but he most certainly does not preclude himself from doing so.[17/] Fane's primary reason for choosing to become a CPA[18/] was presumptively to be able to perform that function, since that is the focus of Florida's CPA law (*see* § 473.301, Fla. Stat.), although he may also have acquired a certain cachet by being able to describe himself as a CPA. It

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16/ It is unclear whether Fane desires to represent taxpayers before the Internal Revenue Service ("IRS"), in which case, he could not cold call solicit the representation of the taxpayer (see Board's initial brief at 22-23, 30), even if he elected not to be a CPA. He speaks of his "expertise . . . in commercial taxation" (J.A. 10) and says he is one of the accountants "who specialize in corporate and individual tax . . . ." (J.A. 25)

17/ Fane refers to "accountants, like myself who . . . seldom, if ever, exercise the attest function." (J.A. 25, emphasis added) Being a CPA, he *may* exercise the "attest" function and accepts the continuing education and other requirements imposed by the Board to ensure his continuing ability to do so and, otherwise, to use Fane's words, to "maintain a high level of professionalism." (J.A. 26)

18/ Fane was, from 1977-1981, an accountant, capable of performing what he says he generally now wants to do, but chose in 1981 to become licensed as a CPA in New Jersey. In 1985, on moving to Florida, he chose to become a Florida CPA. (J.A. 9-10)

hardly behooves Fane to argue that he should be able to engage in inherently unregulatable cold call solicitation because he does not (except "seldom, if ever") want to exercise the "attest" function, when he *may* do so, and the Board is unlikely to ever know whether he did or not.

Fane further contends that the Board is not entitled to "find shelter in *Ohralik*" because it allegedly "disavowed" below an argument that the Rule was necessary "to protect prospective clients from overreaching and undue influence by soliciting CPAs." (Fane's Brief at 22). However, Fane concedes the Board argued *Ohralik* in "all of its submissions," and is simply wrong in his contention that the Board somehow "renounced" a particular argument.[19/] For example, the Dooner affidavit made clear that the Rule is designed to prevent both "overreaching and vexatious conduct by the CPA" and "the opportunity for the potential client to place the soliciting CPA in a compromising position." (J.A. 23). The dissent below viewed the Board's ban on cold calls as curbing an "incentive for fraudulent CPAs," among other things. *Fane v. Edenfield*, 945 F.2d at 1522. Similarly, the District Court below specifically referred to the Board's "argument that a blanket prohibition of in-person, direct, and uninvited solicitation by CPAs is necessary because of the difficulties in proving the occurrence of misconduct . . . ." (J.A. 87-88).

Fane and his supporting amici are uncomfortable with *Ohralik* for good reason. If *Ohralik* controls, as the Board contends it does, a State that is permitted to prohibit cold call solicitation by its state-licensed attorneys must also be allowed to prohibit cold call solicitation by its state-licensed CPAs.

19/ *See*, the Board's petition for writ of certiorari to this Court, pg. 7, 9, 11-19, 22; Joint Appendix 82-85; the Board's initial brief to the Court of Appeals, at 15, 31-35, 39-46 in the District Court; the Board's reply brief to the Court of Appeals, 9, 13-17; the Board's response in the District Court to Fane's motion for summary judgment at pg. 6-8, 10, 12-16. *See also*, Brief of *Amicus Curiae* Florida Institute of Public Accountants in support of the Board, at 6, 8-10, 14-16, 20-21; and brief of the same Amicus to the Court of Appeals at 9-14, 17, 18, 21, 22.

II. Florida's Ban On Direct, In-Person Solicitation By CPAs Furthers A Substantial State Interest, Is Narrowly Tailored To Meet The Desired Objective, And Does Not Violate The First Amendment.

In making his facial challenge to the Board's Rule, Fane misinterprets and misapplies the *Central Hudson*[20] test. Fane does not dispute that preservation of a CPA's independence and integrity is an important State goal, *cf. United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), as is the prevention of fraud, overreaching and misrepresentation. Yet Fane overlooks the fundamental fact that cold call solicitation has been determined to be a practice "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. at 641 (1985), citing *Ohralik*, 436 U.S. at 464-65.[21]

Fane also ignores the fact that this Court has recognized the right of a State to regulate licensed professionals by making a determination that cold call solicitation is a mode of communication so subject to abuse as to be "inherently misleading." *See In re R.M.J.*, 455 U.S. 191, 203 (1982). As such, it may well be, as the Fourth District Court concluded in *Rampell*, that the *first* prong of *Central Hudson* is problematic for Fane. *State Department of Professional Regulation, Board of Accountancy v. Rampell* at 1355, relying on *In re R.M.J.*

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[20] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

[21] "Misleading commercial speech is beyond the protective reach of the First Amendment." *U.S. v. DeFusco*, 930 F.2d 413 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 239 (1991), citing *Vidal Sassoon, Inc. v. Bristol Myers Company*, 661 F.2d 272, 276 n.8 (2d Cir. 1981).

Fane's analysis of the third and fourth prongs of *Central Hudson*[22] confuses advertising, which is not the subject of the Rule's ban, and solicitation, which is. Public advertising differs in important ways from the conduct regarded as solicitation. While advertising uses public channels of communication and is not addressed to particular individuals, solicitation involves a private, direct, personal contact with the potential client to hire a particular accountant for a specific purpose. Solicitation, by its nature, cannot be monitored as can public advertising, and is thus subject to greater abuse.[23]

Solicitation is more than advertising, in that it involves nonspeech elements, such as personally approaching a prospective client and being one-on-one with him. As such, solicitation involves a course of conduct[24] that is simply not a part of public advertising. Although including a speech component, like offers to sell securities or employer's threats of retaliation for employees' labor actions, solicitation is conduct for purposes of governmental

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[22] These words from *In re R.M.J.*, 455 U.S. at 203, fn. 15 must be remembered:

> . . . the *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized profits or services are offered to the public.

[23] As the Court has stated, "the admonition that 'the fitting remedy for evil counsels is good ones' is of little value when the circumstances provide no opportunity for any remedy at all." *Ohralik* at 457.

[24] "We agree that the appropriate focus is on appellant's *conduct* [. . .]." *Ohralik*, at 463 (emphasis added). "In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." *Id.* at 457. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Id.* at 459.

regulation. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949). As this Court has noted:

> Billboards, then, like other media of communication combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, *Kovacs v. Cooper*, [336 U.S. 77 (1949)]
> . . . .

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981).

This Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), recognized that certain professional advertising is deserving of some constitutional protection because it may serve important "societal interests in assuring informed and rational decision-making." However, advertising of the type addressed in *Bates* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), is fundamentally different from solicitation. Solicitation involving personal persuasion and expedited decision-making is likely to discourage prospective clients from engaging in the critical comparison of the "availability, nature and prices" of services, which this Court recognized in *Bates* "performs an independent role in the allocation of resources in a free enterprise system." *Bates*, 433 U.S. at 364. Consistent with this reasoning, this Court premised its four-part test regarding restrictions on commercial speech with a recognition that "the government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563.

Here, Fane does not pretend his cold call solicitation is calculated to "inform." Rather, he admits he wants to "persuade" others to hire him because his services are "superior."[25] In doing

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[25] Fane admits if given the opportunity to conduct cold call solicitation, he intends to "persuade." He does not want to give an independent objective (continued...)

so, his communications will be secret, outside the public marketplace. His competitors will be unable to respond or refute his statements because they will not even know when such discussions occurred or what was said. Likewise, Fane acknowledges there is no prohibition on an accountant soliciting any person or entity by way of written communication. The Rule thus does not prohibit the dissemination of information regarding the availability of services: it just proscribes one method of the communication.

The fourth prong of *Central Hudson* does not require that the Rule be the "least restrictive" necessary to achieve the governmental purpose asserted. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), this Court specifically rejected any such requirement, and held there must be only a "reasonable fit" between the government's asserted purposes and the means by which the government chooses to accomplish those purposes. *Fox*, 492 U.S. at 476. Given the inherent unregulatability of cold call solicitation, the Board's prophylactic Rule constitutes a "reasonable fit" between the regulation and the substantial state interests served.[26]

Fane further complains that even if there is justification for a ban on face-to-face solicitation, there is no justification for a ban

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[25](...continued)
opinion about his professionalism; he wants to persuade others, in face-to-face discussion, that his services are "superior" to those of other CPAs. (J.A. 11-12) But "[t]he court [in *Bates*] suggested that claims as to the quality . . . might be so likely to mislead as to warrant restriction," even if written. *In re R.M.J.*, 455 U.S. at 201. Furthermore, even if Fane were permitted to conduct cold call solicitations, the content of his message would still be subject to prohibition to the extent it creates expectations that cannot be objectively proved. *See* Rule 21A-24-001.

[26] Florida's Fourth District Court of Appeal found the Rule reasonably fit the state's purpose in *Rampell*. *See also, Greenberg v. Michigan Optometric Ass'n., Inc.*, 483 F. Supp. 142, 146-147 (E.D. Mich. 1980) (holding that the state prohibition on personal solicitation by optometrists was not a violation of the First Amendment given the difficulties regulating one-on-one solicitation).

on telephone conversations. Fane contends the potential client can simply hang up if he does not wish to discuss with Fane the alleged "superiority" of the services he offers. This is rarely true. Fane concededly is not interested in prerecorded messages; he wants to call fellow members of such clubs as the local chamber of commerce. The Board is entitled to believe that fellow members of a chamber of commerce are unlikely to be rude and simply hang up on Fane, to the same extent as that a possible client would be unlikely to be rude and just walk away, were the discussion face-to-face. The Board is entitled to proscribe both.

Fane's suggestions for modifying the Rule also are without merit. Fane's suggestion that telephone conversations[27/] with potential clients be taped, for example, is illegal and impractical. Likewise, Fane's suggested "cooling off" period, which is intended for the return of consumer goods, is equally inappropriate, as it reduces CPAs to the status of sellers of Florida homesites[28/] and residential solar water heaters.[29/]

III. The Board's Rule Bolsters CPAs Independence As They Perform The Attest Function.

Fane claims the Board's Rule should not be validated because, he speculates, a CPA's independence becomes threatened only *after* he becomes involved in his client's affairs. Fane's Br. at 18.[30/] This a is distinction with no logical difference. While a

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[27/] Florida law makes criminal most unconsented recordings of telephone conversations. § 934.03, Fla. Stat. (1991).

[28/] § 498.023, Fla. Stat. (1991) (land sales).

[29/] § 501.025, Fla. Stat. (1991) (home solicitation rules).

[30/] Fane alludes to only two practices, simultaneous performance of non-audit management advisory services ("MAS") and audit services by CPAs and "opinion shopping" by clients, as threats to the CPA's independence. Fane argues that impairment of independence occurs only if a CPA could lose an existing client. Fane does not, however, explain why the CPA's fear of *never receiving* the client's lucrative business (the impetus for cold call (continued...)

CPA's independence may well be compromised after the client relationship is established and a CPA's performing management advisory services ("MAS") may also threaten independence, this does not explain how or why the danger of cold call solicitation is mitigated, much less eliminated. The existence of abuse in MAS and in "opinion shopping" after the CPA-client relationship is established only confirms the validity of the Board's concern about unregulatable efforts to establish the relationship in the first place.

A paramount concern for the CPA who desires to perform the "attest" function is not simply to *be* independent but to *appear* to be independent.[31/] In light of the reliance of the market and the public on audited financial statements, there are two equally important forms of auditor independence: independence in fact and independence in appearance. *Matters Relating to Independent Accountants*, 6 Fed. Sec. L. Rep. (CCH) ¶ 73,251 (1992); *note*, *The Big Eight, Management Consulting and Independence: Myth or Reality*, 61 Cal. L. Rev. 1511, 1520, 1526-27 (1988). Independence in fact encompasses "'intellectual honesty' and the absence of an obligation to any financial statement users." 61 Cal. L. Rev. at 1520, citing Berryman, "*Auditor Independence: Its Historical Development and Some Proposals for Research*," in *Ethics in the Accounting Profession*, 141, 155 (1978). Independence in appearance is "'the perception of the auditor's independence by parties interested in audit reports.'" *Id.*

[30/](...continued)
selling) is not a legitimate basis for regulating CPA conduct, while acknowledging that the fear of losing already existing business is a legitimate ground. The Board has as much regulatory concern with the creation of the CPA-client relationship as with its preservation.

[31/] As stated by Sternberg, *Cooked Books: Practices of Large Accounting Firms Contributed to Financial Scandals*, Vol. 269, No. 1, The Atlantic, 20, 22 (January, 1992), "Many people believe that auditors play detective, digging out aberrations and blowing the whistle at the slightest hint of wrongdoing. A clean audit is seen as akin to the Good Housekeeping Seal of Approval, stamped by wizened veterans who have carefully combed through the records and carefully tracked down every lead."

The Board's regulation of CPA cold call solicitation advances the CPA's overriding need both to *be* independent and to *be perceived* as independent. Rigorous competition for CPA services may compel CPAs to take positions they might not otherwise take, particularly when companies convey their willingness to "opinion shop" for favorable audits. Goelzer, *The SEC and Opinion Shopping: a Case Study in the Changing Regulation of the Accounting Profession*, 52 Brook. L. Rev. 1057, 1058 (1986).[32] Because uninvited solicitation is inherently unregulatable, it provides the CPA an opportunity to express his willingness to perform a favorable, rather than an objective, audit. The CPA's improper message may be conveyed through an outright statement of fact, a vocal intonation, or simply by the sheer novelty of a call from a stranger who wishes to sell his purportedly objective (albeit "superior") skills. By foreclosing such signaling, the Board strengthens CPAs actual independence.[33]

Fane also argues that CPAs are not formally trained in the arts of persuasion and advocacy, and therefore their sales endeavors are more likely to involve benign presentations of fact, rather than arm twisting and professional gamesmanship. Fane's Br. at 24-25. This assertion defies reality. CPAs are -- and must be -- advocates in numerous contexts. When a CPA performs an

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[32] Analyzing CPAs' roles in a litany of financial scandals, one commentator notes "As the audit firms became more competitive and bottom-line oriented, the pressure to retain fee-paying clients and perform quick audits overwhelmed concern about the firms' long-term reputations." Sternberg, *supra* at 25.

[33] CPAs' reputations in the attest function have incontrovertibly fallen on hard times. *See Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), *cert. granted*, __ U.S. __, 112 S.Ct. 1159 (1992); Goelzer, *supra* at 1057; *also* Sternberg, *supra*. The opportunity to make undetectable improper or fraudulent representations to a potential client impacts both actual and apparent independence. Even if the CPA promises to and in fact does fulfill his audit duties impeccably, the inescapable conclusion in many potential clients' minds (and the general public) may be that the CPA *might* not give an accurate rendering.

MAS assignment, he so acts. 61 Cal. L. Rev. at 1525. Similarly, when CPAs lobby for or otherwise urge a favorable tax position or policy for their clients, they so act. *The Accounting Establishment*, A Staff Study of the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations, S. Doc. No. 95-34 at 52, 95th Cong., 1st Sess. (March 31, 1977). Fane can hardly argue that CPAs will discard advocacy skills when they place uninvited solicitation calls to potential clients.[34]

IV. The Rule Does Not Violate The Equal Protection Clause, Nor Does It Prevent Competition.

Fane contends the Rule violates the Equal Protection Clause[35] because "other financial professionals" may engage in solicitation. (Fane's Br. at 32). Fane offers no definition of "professional," nor is there any citation to the record to support his assertion. The simple fact is that Fane *chose* to become a CPA; presumably because, along with his Masters in Taxation [J.A. 9], it gave him a title that he could use to secure business not available to him as an "accountant," "tax preparer," "bookkeeper," or "other financial professional", whatever those terms may mean. Fane sought the CPA's certificate, with all the benefits that go with it, but does not want to accept the burdens of being a licensed learned

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[34] As the dissent below noted:

> Anyone who has ever signed, without fully understanding, a tax return or other financial statement prepared by a CPA simply because the CPA says, "you sign here," knows just how persuasive a CPA can be."

Fane v. Edenfield, 945 F.2d at 1522.

[35] The District Court, although not reaching "plaintiff's equal protection argument" observed:

> "Only CPA's [sic] perform the attest function, therefore the prohibition does not restrict other providers of related financial services" and commented "that point seems to dispose of the . . . argument . . . ." (J.A. 79, fn. 3)

professional, one of which is the responsibility of complying with rational professional standards set by the Board.[36]

Since only a rational distinction is required to justify differential treatment under the Equal Protection Clause, certainly it is rational to require that persons who elect to bear the title of CPA solicit in a manner such that the nature of their solicitation can be reviewed by the Board that authorizes them to bear that title.[37] As was recently said, with respect to the medical profession:

> Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Planned Parenthood of Southeastern Pennsylvania v. Casey, ___ U.S. ___, 112 S. Ct. 2791 (1992). (Joint Opinion). Those who are licensed may be held to a higher standard of professionalism just because the public perceives them to be, and relies on them, as professionals.

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[36] Fane's appellation, "CPA," is inherently valuable, and permits Fane to distinguish himself from others not so titled. *See Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605 (4th Cir. 1988).

[37] Fane tries to analogize targeted direct mail to cold calls. The analogy fails. Targeted direct mail is written, and as such is reviewable. For that reason, a direct personal written solicitation, such as that involved in *In re Primus*, 436 U.S. 412, 416 n.6 (1978), is permitted by the Board. Fane's argument that the Rule is "speaker-specific" is equally without merit. The Board has authority to regulate its licensed CPA's. Thus, by definition, the Board's authority is limited as to the accounting profession, and *all* its rules are "speaker-specific" to that profession.

Fane further argues the ban suppresses competition within the profession by hindering efforts of new entrants to attract clients. (Fane's Br. at 33). This argument too, is fallacious. It is Fane who would decrease competition within the profession, by being able to make private one-on-one comments to clients of his competitors without them even knowing what he is saying, thus denying them any effective chance of competing. *Cf. State Department of Professional Regulation, State Board of Accountancy v. Rampell, supra.* Further, one-on-one contacts discourage competition, since in many instances the consumer has no basis for evaluating the offer being made to him. Rather than promoting the "free flow of economic information," Fane's cold call solicitation will serve only to decrease the amount of information available in the public marketplace.[38]

V. Florida's Rule Is A Reasonable Time, Place And Manner Restriction.

Relying upon *Virginia State Board of Pharmacy* and *Bates*, Fane contends the Rule is not a reasonable time, place and manner restriction because it is a prophylactic ban on a particular mode of expressive activity, and because it is not "content-neutral." Fane's contention misapplies the Court's holdings in those cases to the facts established here. In this case, the Rule is narrowly drawn, and affects only a mode of expression, not the speech itself. Fane is permitted to deliver his message in any mode other than through cold call solicitation. The Rule is thus fundamentally different from the regulations challenged in *Virginia State Board of*

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[38] Fane also makes an "underinclusiveness" argument, apparently overlooking (although citing) this Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, __ U.S. __, 112 S.Ct. 2538 (1992), in which this Court noted the First Amendment imposes "not an 'underinclusiveness' limitation, but a 'content-discrimination' limitation upon a state's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be 'underinclusive,' it would not discriminate on the basis of content." The Rule does not discriminate on the basis of content, and thus there is here no valid argument for "underinclusiveness."

Pharmacy and *Bates*, which regulations sought to ban the message itself--not simply the medium through which the message could be delivered.[39/]

Fane further errs in his contention that "none of the lawyer advertising cases decided by this Court discussed or relied on the time, place, and manner restriction doctrine." (Fane's Br. at 34). In fact, as this Court observed in *Bates*,

> In holding that advertising by attorneys may not be subject to blanket suppression, and that the advertising at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. . . . As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. *See Virginia State Board of Pharmacy v. Virginia Council*, 425 U.S. at 771, 96 S.Ct. at 1830.

433 U.S. at 383-84. And, as noted above, this Court in *In re R.M.J.* confirmed the right of state licensing professional to ban "inherently misleading" solicitation.[40/]

Nor is *Boos v. Barry*, 485 U.S. 312, 320 (1988), also relied on by Fane, to the contrary. In that case, which involved the ban on certain "unfriendly" political speech, this Court observed:

[39/] "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero*, 486 U.S. at 475.

[40/] Not only is the Rule a reasonable time, place and manner restriction, but it is also content neutral. Fane cites to *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) as saying "[g]overnment regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech'" (emphasis in original). But this proposition *supports* the Rule, for where a person can deliver a message through any medium save one (cold call solicitation), the restriction must by its very nature be content-neutral.

> So long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded [in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)] that the regulation was properly analyzed as content-neutral.

Id. at 320.[41/]

Here, the Board's Rule has nothing to do with the content of Fane's message; it would be equally applicable were Fane simply to deliver his name and address, or affirmatively to misrepresent his services. Fane can deliver his message through any medium other than cold call solicitation; and with respect to such cold calls, the specific message does not matter. It is the use of the medium the Board prohibits, not the message.

[41/] The *Amici Curiae's* reliance on *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) is also misplaced. This Court did not mention *Linmark* in *Ohralik*, and patently did not consider it relevant. In *Linmark* this Court recognized the challenged ordinance was actually an attempt to control the message (that a house was for sale) rather than the method of communication. The Court noted other signs were not barred, only "for sale" signs. Thus the ordinance attempted to stop sales of homes in a racially integrated neighborhood by prohibiting the best way of selling -- a "for sale" sign on the house.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed; and the courts below should be directed to enter judgment in favor of Petitioners Fred H. Edenfield, et al., upholding the facial constitutionality of the Board's Rule prohibiting direct, in-person uninvited solicitation of potential clients by Florida licensed CPAs.

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